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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. A-103

NANCY GAYLE SMART, *Petitioner*,

v.

CLARENCE JONES, ET AL., *Respondents*.

Petition for a Writ of Certiorari to The United States Court of Appeals for The Fifth Circuit

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The petitioner, Nancy G. Smart, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 6, 1974.

OPINION BELOW

No written opinion was rendered by the Court of Appeals nor by the District Court for the Northern District of Texas.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on April 18, 1974. A timely petition for rehearing en banc was denied on June 6, 1974. An order extending time to file petition for writ of certiorari in this cause was signed by Mr. Justice Lewis F. Powell of the Supreme Court of the United States on August 28, 1974 extending the time for filing a petition for writ of certiorari to and including November 3, 1974. This petition for certiorari was filed prior to November 3, 1974. This Court's jurisdiction is invoked under Title 28 U.S.C. Section 1254(1).

Petitioner's original complaint alleged violations of privileges and immunities secured by the Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States; Title 42 U.S.C. Sections 1983, 1985, 1986 and 1988; and Title 28 U.S.C. Sections 1331 and 1343(3).

QUESTIONS PRESENTED

1. In federal civil rights litigation is the Court of Appeals for the Fifth Circuit required to follow settled state laws as mandated by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938) i.e., (a) in Texas a Notice of Commissioners' Hearing in a condemnation proceeding is not a civil process, and (b) in Texas "probable cause" is not a defense for an arrest without a warrant in misdemeanor crimes which do not occur at the time and place of the arrest?

2. Is the Fifth Circuit Local Rule 21 contrary to the public duty of the judiciary to state what the law is and

unconstitutional in denying due process and equal protection of the law pursuant to the Fifth and Fourteenth Amendments of the Constitution of the United States?

3. Is Art. 332(c) Tex. Rev. Civ. Stat. Ann. unconstitutional and contrary to public policy and the American Bar Association Code of Professional Responsibility for Attorneys?

4. Is an individual, who is arrested for a crime and the charges subsequently dismissed on motion by the district attorney and a court order approving same entered, entitled to have the arrest record expunged in judicial proceedings?

CONSTITUTIONAL PROVISIONS AND STATUTES

The Constitutional provisions and statutes involved are lengthy and are set forth in Appendix A. The provisions are the Fourth, Fifth, and Fourteenth Amendments to the United States Constitution, Title 28 U.S.C. Secs. 1331 and 1343(3); Title 42 U.S.C. Secs. 1983, 1985, 1986, and 1988; Tex. Rev. Civ. Stat. Ann. Art. 3264(2), (3), and (6); Tex. Penal Code Arts. 336, 340, 382, and 1147; Tex. Code of Crim. P. Arts. 2.09, 2.10, 2.13, and 14.01(b); and Tex. Rules of Civ. P. Rule 15.

STATEMENT OF THE CASE

Petitioner, Nancy Gayle Smart, was arrested without a warrant on misdemeanor charges by Dallas County Deputy Sheriffs on September 11, 1972, at a time and place remote from the scene of the alleged crimes. She was handcuffed, fingerprinted, mug shot and incarcerated in jail until

freed by bond. The uncontroverted trial testimony was that she suffered severe physical injury as a result of being handcuffed behind her back for approximately two hours. She was charged with violation of (a) preventing execution of civil process, Art. 336 of the Texas Penal Code and (b) aggravated assault against a peace officer, Art. 1147, of the Texas Penal Code, in a non-attorney justice of the peace court in which she was given no opportunity to make a telephone call or have benefit of counsel. No testimony or statements were given in court before the committing magistrate in her presence.

The complaining officer Respondent, Deputy Sheriff J. W. Grandstaff, while attempting to deliver a Notice of Commissioners' Hearing in a Texas condemnation proceeding was under the mistaken belief in law that this Notice constituted a civil process, and conferred an official duty and authority upon him, which was the necessary basis for any criminal charges against Petitioner.

Petitioner filed a federal civil rights suit against Respondents on November 9, 1972 and Assistant District Attorney for Dallas County, John B. Tolle, filed an answer for the Respondents and at about the same time took over as the new prosecutor against Petitioner in the still pending criminal misdemeanor charges. Petitioner refused to plea bargain with the prosecutor and after five months of his dual role as prosecutor against her and defender against her civil rights suit, he dismissed all criminal charges and judgment of dismissal was entered on April 23, 1973.

The answer filed for the Respondents claimed Petitioner violated Art. 340 of Texas Penal Code, resisting execution

of civil process, with which Petitioner was never charged; and violated Art. 1147 of the Texas Penal Code, aggravated assault against a peace officer. Respondents claimed to have arrested Petitioner pursuant to the provisions of Art. 14.01(b) of the Texas Code of Criminal Procedure which defines the manner in which an arrest without a warrant shall be performed. Petitioner was actually charged with violation of Art. 336 of the Texas Penal Code, interference with civil process, which provides by any means not amounting to actual resistance. This was contradictory to the defense raised under Art. 340 of the Texas Penal Code, resisting execution of civil process, which provides whoever shall wilfully resist or oppose an officer in executing or attempting to execute, any process in a civil cause shall be fined not exceeding five hundred dollars. The crime charged was by means not amounting to actual resistance and the defense raised was by wilful resistance or opposition. Art. 1147 of the Texas Penal Code, aggravated assault against a peace officer, provides that an assault becomes aggravated when committed upon an officer in the lawful discharge of the duties of his office. If a Notice of Commissioners' Hearing is not a civil process, it was impossible for Petitioner to violate Arts. 336, 340, and 1147 of the Texas Penal Code as a matter of law.

Respondent J. W. Grandstaff, admitted under oath he could have arrested Petitioner at the time of the alleged criminal acts but chose to leave her which was contrary to Art. 382 of the Texas Penal Code which makes it a criminal offense for a peace officer to leave the scene where a crime has been committed in his presence and view. The District Attorney's office having full knowledge of the admitted

facts by J. W. Grandstaff has never filed any charge against him.

The evidence was uncontroverted that Petitioner was not guilty of any crime at the scene of her arrest without a warrant on San Felipe Street. There has never been any contention or suggestion that she was guilty of any felony. At all times before the trial and appellate courts, Petitioner has protested the District Attorney playing the dual roles as prosecutor of her and defender of public officials, and all requests to have the District Attorney dismissed as the attorney for the Sheriff's office were denied. The District Attorney claimed an obligation to defend the Sheriff because of Article 332(c) Tex. Rev. Civ. Stat. Ann. which was enacted approximately seven months after their entering the case. The Assistant District Attorney John B. Tolle in his argument to the trial jury stated that Petitioner had not proven her innocence even though he had dismissed the charges. He also claimed errors of the District Attorney's office in filing the charges as a defense for the Sheriff's department. This was a veiled threat that they could refile the charges again, although they never did and the statute of limitations has since barred any refilings.

The charge to the jury instructed them as to Texas Penal Code Art. 340 and 1147 both of which were irrelevant unless a civil process was involved. The trial charge as to "probable cause" indicated that such facts or evidence which would induce a reasonable person to believe an offense against the law had been committed. There was no instruction by the court that probable cause to arrest had to be as to the facts which occurred at the time and place

of the arrest. The jury made a finding there was probable cause to believe the Petitioner had committed an offense against the law but there was not any finding as to what law had been violated although the implication would be that she had violated Art. 340 (with which she was never charged) and Art. 1147 both of which were impossible to violate as a civil process was not present.

Petitioner's brief to the Fifth Circuit set forth the Texas authorities which conclusively established that in Texas a Notice of Commissioners' Hearing in a condemnation proceeding is not a civil process. Respondents' attorney offered no contrary authority whatsoever, but after the Fifth Circuit entered a judgment without rendering an opinion the District Attorney's office offered this as their first authority for the proposition that a Notice of Commissioners' Hearing in a condemnation proceeding is a civil process. This occurred in a companion case now pending in District Court. This is completely contrary to the established State statutory and case laws decided by the Supreme Court of Texas.

The uncontroverted testimony was that Petitioner never touched or made any threats to the complaining witness J. W. Grandstaff. The charge of aggravated assault against a peace officer was without a basis in law.

On August 24, 1974 Petitioner filed in the trial court Plaintiff's Original Motion to Set Aside Judgment pursuant to Rule 60(b) F.R.C.P. because of newly discovered evidence, fraud, and misrepresentation by adverse party, and the judgment is void. Newly discovered evidence consisted of: 1. On July 29, 1974 the District Attorney's office in a companion civil rights case, No. CA 3-7646-E, Smart

v. Jones et al., requested to withdraw from representing Sheriff Jones because of a conflict of interest and a court order was entered on August 13, 1974 allowing the withdrawal. Petitioner maintained at all times in her case that there was a conflict of interest for the District Attorney to represent the Sheriff and all her efforts to force the District Attorney to withdrew were in vain. 2. Petitioner discovered subsequent to the trial of her case that the District Attorney had in his possession prior to her trial an Opinion of the Attorney General of the State of Texas, No. C-164 which set forth in unequivocal language that the Sheriff had nothing to do with condemnation proceedings until the Commissioners file their award. It is clear from this Opinion that the Sheriff has no official duty with reference to serving a Notice of Commissioners' Hearing in condemnation. This lack of official duty made it an absolute impossibility for Petitioner to violate Art. 1147 of the Texas Penal Code which was raised as a defense to her civil rights suit and this statute was presented in the court's charge to the jury. 3. Respondent J. W. Grandstaff under oath had claimed that Petitioner had attempted to "wreck him out" in a deposition given on November 29, 1973 and his attorney, Assistant District Attorney Gerald Weatherly, stated you can put me on the record that there is no such crime as "wrecking out". The court submitted to the jury for its consideration whether a crime had taken place and Respondent's own attorney has admitted no such crime exists. 4. Assistant District Attorney Gerald Weatherly acting in his official capacity and as an official of the State of Texas has presented to the trial court in a companion civil rights suit, No. CA 3-7646-E, that the Fifth Circuit's Judgment in

Petitioner's suit is authority for the proposition that a Notice of Commissioners' Hearing is a civil process. This is contrary to the settled state law of Texas and contrary to the Attorney General's Opinion directed to the District Attorney.

Petitioner contended that the newly discovered evidence and suppression of the Opinion of the Attorney General of the State of Texas entitled her to have the judgment of the trial court set aside pursuant to Rule 60(b) F.R.C.P. Petitioner was deprived of a fair trial by allowing the District Attorney to represent the Sheriff and the failure of the District Attorney to present to the court the Texas Attorney General's Opinion. Assistant District Attorney John B. Tolle in his argument to the jury stated Petitioner had not proven her innocence, although he had dismissed all charges against her. He further claimed errors of the District Attorney's Office as a defense for the Sheriff.

The Federal District Court Judge, the Honorable Sarah T. Hughes, refused in orders entered on September 3rd and 9th, 1974 to set aside the judgment entered against Petitioner on October 19, 1973.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISION OF THE U.S. SUPREME COURT AND FOLLOWED BY THE OTHER COURTS OF APPEALS IN THE ERIE RAILROAD CO. V. TOMPKINS DOCTRINE AND DEFEATED PETITIONER'S CIVIL RIGHTS.

It is the duty of the judiciary to follow the substantive

law of a state as decided by its highest appellate court. The settled state law is the law of the federal court. In Texas the settled state law is: (1) A Notice of Commissioners' Hearing in a condemnation proceeding is not a civil process. (2) An arrest without a warrant for a misdemeanor must occur at the time and place the misdemeanor occurs. (3) Probable cause is not a defense to an arrest without a warrant for a misdemeanor in which it is uncontroverted no crime occurred at the time or place of the arrest.

Respondent Deputy Sheriff J. W. Grandstaff's sole and only purpose during his encounter with Petitioner was to deliver a Notice of Commissioner's Hearing to her fiancé, now her husband, Don M. Smart. He was mistaken as a matter of law in believing this Notice was a civil process or that he had any official duty to perform in regard to this Notice.

Petitioner has raised at every stage of this proceeding including County Criminal Court No. 2, Federal District Court, and the Court of Appeals for the Fifth Circuit that a Notice of Commissioners' Hearing in a condemnation proceeding is not a civil process. If this is true she was entitled to a judgment in her favor for violation of her civil rights as a matter of law. The only basis for the criminal charges against her was based on a civil process and the official duty thereunder. The criminal charges of preventing execution of civil process without force, Art. 336 of the Texas Penal Code and aggravated assault against a peace officer, Art. 1147 of the Texas Penal Code were patently in conflict and impossible as a matter of law if there was not a civil process creating an official duty. The Notice of

Commissioners' Hearing is issued by non-judicial Special Commissioners at the administrative stage of "quick take" condemnation proceedings in Texas. This Notice on its face is not styled the State of Texas, nor directed to any Sheriff or Constable nor attested by a clerk with the seal of the court impressed thereon as required by Rule 15 of the Texas Rules of Civil Procedure. The Sheriff's department made a return on the Notice approximately 60 days after its delivery. The particular Notice in this cause was void as a matter of law in that the date on which it was delivered did not allow ten days notice exclusive of the date of delivery and the date of hearing as required by the statute by whose authority it arose, Art. 3264(6) of Tex. Rev. Civ. Stat. Ann., which further provides that the Notice may be served by anyone competent to testify. The Notice was merely an invitation for the condemnee to appear at a hearing in which the Commissioners had only the power to determine the question of damages. Until an appeal is made to a judicial tribunal by the condemnor or the condemnee, the proceeding is purely administrative. The Special Commissioners are not magistrates (Art. 2.09 of the Texas Code of Criminal Procedure) and could not issue a process (Art. 2.10 of the Texas Code of Criminal Procedure). There was no duty or power of the Special Commissioners to issue lawful process (Art. 2.13 of the Texas Code of Criminal Procedure).

The Dallas County District Attorney had Opinion No. C-164 of the Attorney General of the State of Texas directed to him in which it was set forth in part that the Sheriff has nothing to do with the condemnation proceeding until the

Special commissioners file their award.

Opinion No. C-164

"1. The Petition or Statement of Condemnation is filed with the County Judge who appoints the Commissioners. (Article 3264, Sec. 2). Neither the Judge, Clerk, nor Sheriff has anything whatever to do with the proceeding thereafter until the Commissioners file their award or decision with the Judge as provided by Article 3265(5)."

The Supreme Court of the State of Texas has said that an Attorney General's Opinion is entitled to great weight and should be followed unless the court is convinced it is wrong (*San Antonio Junior College District vs. Daniel* 206 S.W.2d 995).

The case authorities have uniformly held that the Notice of Commissioners' Hearing is issued from a purely administrative proceeding and is not issued from a court or from a civil proceeding: *Pearson v. State* 315 S.W.2d 935 (Tex. Sup. Ct. July 9, 1958, reh. den. Oct. 1, 1958); *Rayburn v. State of Texas* 356 S.W.2d 774 (Tex. Sup. Ct. April 25, 1962, reh. den. May 23, 1962); *Rose v. State of Texas* 497 S.W.2d 444 (Tex. Sup. Ct. June 27, 1973, reh. den. July 25, 1973); *Dickey v. City of Houston* 501 S.W.2d 293 (Tex. Sup. Ct. Nov. 7, 1973, reh. den. Dec. 5, 1973). At no time in this proceeding have Respondents offered any authority whatsoever that a Notice of Commissioners' Hearing is a civil process.

It was a plain error of law for the trial court to suggest to the jury a violation of Arts. 340 and 1147 of the Texas Penal Code as it was impossible as a matter of law for Petitioner to have violated these statutes. To so charge the jury constituted a plain error of law as this shifted the burden

of proof to Petitioner to establish her innocence of non-existent crimes. This same trial judge was overruled on this same point by the Fifth Circuit in *Sheppard Federal Credit Union vs. Palmer*, 408 F.2d 1369 (1968) in which it was pointed out that a federal court must abide by the state law as it is, not as the court wishes it might be.

The District Attorney in defending the Sheriff and his Deputies against Petitioner's claim that her civil rights had been violated, pleaded that Petitioner was guilty of violating Art. 340 of the Texas Penal Code and Art. 1147 of the Texas Penal Code. Petitioner was never charged at anytime with a violation of Art. 340; yet, she was called upon to defend against such a charge to enjoy her civil rights. The District Attorney dismissed the charge on Art. 1147 and yet sought to claim a criminal violation and force Petitioner to defend against such dismissed charge. The District Attorney also dismissed the charge on Art. 336 and did not consider it of sufficient merit to be pleaded as a defense.

Even in the brief of the Appellees in the Court of Appeals for the Fifth Circuit filed by the District Attorney, the demand was made for the first time for the Petitioner to prove her innocence of an alleged violation of Arts. 1138 and 1139 of the Texas Penal Code and 6701(d) Tex. Rev. Civ. Stat. Ann.

This presents squarely the question of whether to enjoy the protection of 42 U.S.C. §1983 the Petitioner is called upon as a matter of law to prove her innocence against every criminal statute the District Attorney wishes to plead in behalf of his clients. The fact remains that Petitioner was charged before the magistrate with a violation of Arts. 336

and 1147. No other charges have ever been filed, nor has the District Attorney sought to prosecute the Petitioner on any other charges. These charges and these alone represent the basis of the unlawful arrest and the false imprisonment of Petitioner. These are the charges which violated her civil rights.

The civil rights of Petitioner should not, and do not, rest upon her ability to prove her innocence of every charge the District Attorney can plead in a civil suit. The fundamental rule of law that Petitioner is innocent until proven guilty by the established rules of criminal law are in this manner totally abrogated and set at naught thus rendering her civil rights more illusory than real.

The trial court presented "probable cause" as a defense in its charge to the jury. Petitioner presented to the trial court that *Rodriguez vs. State* 172 S.W.2d 502, is still controlling:

> "To justify an arrest without warrant the offense must amount to a breach of the peace, and must be actually committed in the presence of the person making the arrest, and arrest must be made when an offense was committed."

In Petitioner's hearing for a summary judgment before the trial court, Assistant District Attorney John B. Tolle, stated that Article 14.01(b) of the Code of Criminal Procedure has materially changed the rule as to when an arrest will be made without a warrant. However, Article 14.01(b) of the Texas Code of Criminal Procedure was enacted in 1967 and the Fifth Circuit in 1968 in *Phelper vs. Decker*, 401 F.2d 232 (1968) stated on page 236 in footnote 9:

> ". . . A brief check shows Texas law apparently to be that the

> officer must make the arrest immediately after the offense for a misdemeanor crimes, cf. *Rodriguez v. State* 1943, 146 Tex. Cr. R. 206, 172 S.W.2d 502."

From the same case on page 238 in footnote 21:

> "Prior to 1967, peace officers in Texas could arrest a person without a warrant for a misdemeanor only if it was classified as being against the public peace. Tex. C. Cr. Pro. Ann. Art. 1401 (Sup. 1967) (emphasis added)."

Art. 14.01(b) did not change the rule in Texas that an arrest without a warrant for a misdemeanor must be made immediately. In Texas "probable cause" is not a defense to an arrest without a warrant for a misdemeanor unless that arrest is made at the time and place of the alleged incident. To raise "probable cause" as a defense for Respondent was a plain error of law and is contrary to *Erie R. Co. vs. Tompkins*, 304 U.S. 64 (1938). It was uncontroverted that Petitioner was arrested without a warrant for a misdemeanor at a different time and place from the alleged incident. To refuse to apply settled state laws is a miscarriage of justice.

It was necessary to make two plain errors of law in order to defeat Petitioner's civil rights suit. Without both the error that a Notice of Commissioners' Hearing is a civil process and the error that "probable cause" is a defense to an arrest without a warrant in a misdemeanor crime occuring at a different time and place from the arrest, Petitioner was entitled to a judgment in her favor as a matter of law.

2. FIFTH CIRCUIT LOCAL RULE 21 DEPRIVES LITIGANTS OF ANY MEANINGFUL APPELLATE REVIEW AND IS CONTRARY TO THE JUDICIAL DUTY TO SAY WHAT THE LAW IS.

Local Rule 21 of the Fifth Circuit is designed to sum-

marily dispose of large amounts of litigation with the least amount of work. This is to be reserved for cases without precedential value. It should have no application whatsoever in decisions which overturn settled state law as the courts have a duty to say what the law is. No opinion was rendered by either the trial court nor the Fifth Circuit. It is perfectly clear from the authority presented by Petitioner that the settled law of Texas is that a Notice of Commissioners' Hearing is not a civil process. To affirm without a written opinion a judgment in which a contrary finding is necessary, denies an appellant of any meaningful appellate review. The inherent danger of the Rule is that it allows invideous discrimination against individuals by summarily disposing of cases in which plain errors of law are made but that individual would not be able to use the new holding in companion or subsequent cases.

It was a plain error of law to present probable cause as a defense for Respondents in a misdemeanor occuring at a different time and place than the alleged crime as this has no application whatsoever as a defense for a misdemeanor arrest without a warrant at a different time and place. To present a jury with this charge could only confuse them and was contrary to settled state law. To summarily dispose of a case in which this charge was presented would be to present a plain error of law as a defense but to deny it to other litigants who might desire such a holding.

The Fifth Circuit in *N.L.R.B. v. Amalgamated Clothing Workers of America*, 430 F.2d 966 (5th Cir. 1970) indicated that Local Rule 21 was devised because of the case load and also that an opinion would be of no precedential value.

Petitioner's case rendered under Local Rule 21 is now being used by the State of Texas acting through it's District Attorney in a companion case that a Notice of Commissioners' Hearing is a civil process. The inherent dangers of summarily disposing of civil litigation in which time is not as crucial as in criminal matters and the U.S. Supreme Court's inability to review any significant number of writs of certiorari would suggest that to summarily dispose of an appellant's appeal would often deny him any meaningful appellate review. It is further suggested that this Local Rule 21 for all practical purposes allows the Court of Appeals to take a discretionary adjudication as to any meaningful review. Such discretion is reserved to the U.S. Supreme Court and summary disposition of a case is not within the proper province of the Court of Appeals.

In summarily denying the appeal of Petitioner the Court of Appeals, Fifth Circuit, thereby made a pronouncement of law without stating the legal conclusion that the bar and public may know the law concerning the adjudication. The legal conclusion in this case was that a Texas peace officer with a Notice of Commissioners' Hearing in a condemnation proceeding is acting in an official capacity and performing an official duty. This legal conclusion, for it was the legal grounds on which Petitioner was denied recovery for violation of her civil rights, makes a statute of the State of Texas mean one thing in the federal courts and a different and opposite thing in the courts of the State of Texas.

The finding below by necessary implication that the administrative condemnation procedure of Arts. 3264-3267 Tex. Rev. Civ. Stat. Ann. is a civil cause makes said statutes

subject to the additional constitutional attack as violation of the Fifth and Fourteenth Amendments to the U.S. Constitution. No notice of the filing of the petition in condemnation is provided to be made to the property owner. No opportunity to be heard by the tribunal as to questions of law or fact, save the amount of damages to be determined by commissioners selected ex parte, is accorded the property owner which is in total violation of the constitutional rights of due process. *Mitchell v. W. T. Grant Co.*, ... U.S. ....., 40 L.Ed.2d 406 (1974); *Fuentes v. Shevin*, 407 U.S. 67 (1972); *Lynch v. Household Finance Corp.*, 405 U.S. 538 (1972); and *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969).

These statutes are before this Court on an appeal from the judgment of a Three Judge Court from the Northern District of Texas, Dallas Division, in the case of *Joiner et al. v. City of Dallas.*

3. ARTICLE 332(c) OF TEX. REV. CIV. STAT. ANN. IS UNCONSTITUTIONAL BECAUSE OF DENIAL OF DUE PROCESS AND EQUAL PROTECTION OF THE LAW PURSUANT TO THE FIFTH AND THE FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES AND VOID AS CONTRARY TO PUBLIC POLICY.

Art. 332c, Acts 1973, 63rd Leg., p. 1765, ch. 644, eff. June 16, 1973 provides:

> "Sec. 2. In any suit instituted by a nonpolitical entity against an official or employee of a county, the district attorney of the district in which the county is situated or the county attorney, or both, shall represent the official or employee of the county

> if the suit involves any act of the official or employee while in the performance of public duties."

To allow district attorneys to use the power and prestige of their office in defending public officials in civil rights litigation presents an inherent conflict of interest in which the district attorney has the duty to prosecute criminal violations whether they are occasioned by public officials or private individuals. When the district attorney defends public officials who are accused of violating a private individual's civil rights, the district attorney would be placed in the position of prosecuting his client he is defending, if it were proven the public official had violated the individual's civil rights. The obvious reluctance to prosecute his own client at times results in a denial of equal protection of the law.

The 1970 American Bar Association Code of Professional Responsibility, which provides a public policy for the ethical conduct of counsel, was adopted by the State Bar of Texas in essentially the same form.

The A.B.A. Code of Professional Responsibility at p. 25 at EC 7-14 provides:

> "A government lawyer who has discretionary power relative to litigation should refrain from instituting or continuing litigation that is obviously unfair."

Assistant District Attorney John B. Tolle continued prosecution of Petitioner for approximately five months while at the same time defending against her civil rights suit. When Petitioner attempted to obtain discovery in federal court as to the criminal allegations, Mr. Tolle claimed an attorney-client privilege with the complaining criminal witness.

The A.B.A. Code of Professional Responsibility at p. 34 at DR 8-101(A)(2) provides:

> "A lawyer who holds public office shall not use his public position to influence, or attempt to influence, a tribunal to act in favor of himself or of a client."

Assistant District Attorney John B. Tolle in his final argument to the jury stated that Petitioner had not proven her innocence and there was no evidence except that the district attorney had filed the charges wrong and they can be refiled.

The A.B.A. Code of Professional Responsibility at p. 28 provides:

> "DR 7-105 Threatening Criminal Prosecution.
> (A) A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

Assistant District Attorney John B. Tolle in his final argument to the jury stated there was no evidence of anything except the charges were filed wrong, they can be refiled over. This was a threat that the district attorney would refile the charges. The statute of limitations for refiling has since run without refiling, so the only conclusion that could be made was that the threat to refile was not made in good faith, but only made solely to obtain an advantage in a civil matter.

The uncontroverted testimony of Respondent Deputy Sheriff J. W. Crandstaff was that if Petitioner was guilty of any crime she committed it on Lake Highlands Drive and he could have arrested her at that time. If the Assistant District Attorney John B. Tolle was correct that Petitioner had violated Arts. 340 and 1147 of the Texas Penal Code,

which would have occurred on Lake Highlands Drive, then he had a duty to charge J. W. Grandstaff with violation of Art. 382, the only conclusion that can be drawn is that the District Attorney violated his duty to prosecute for violations of law or that his claim that Petitioner had violated Arts. 340 and 1147 was made solely for the defense of the Deputy Sheriff and it was not made in good faith. Therein, lies the inherent conflict of interest in which a public official, the district attorney, uses the power and prestige of his office to defeat the civil rights of a private individual. It is contrary to public policy to allow such an official to be both the prosecutor against a civil rights litigant and at the same time be a defender against their just claims.

4. IS AN INDIVIDUAL WHO IS ARRESTED AND THE CHARGES SUBSEQUENTLY DISMISSED ENTITLED TO HAVE THE ARREST RECORD EXPUNGED.

This is a national recurring problem in which computer technology has provided a heretofore non-existent technique for dispersing arrest records on a national scale. It is common knowledge that such an arrest record may have a violent and harmful effect upon an individual's ability to obtain employment. Many employment forms including the California Bar Association's Bar Application merely inquire as to an arrest record rather than a conviction or disposition of the case. Most of the computer files of arrest records do not even provide for follow up information as to the disposition of the case and certainly do not provide that the arrest record be removed from the computer files if the case were dismissed. Petitioner's cause is a perfect

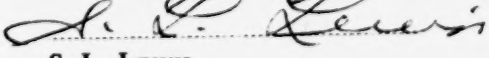
example of an individual charged with a crime which could not exist as matter of law. The District Attorney was unwilling to present the charges to a court for a determination of guilt. To refuse expungement of an arrest record denies Petitioner due process and equal protection of the law pursuant to the Fifth and Fourteenth Amendments in jeopardizing, compromising and damaging her good reputation as a law abiding citizen without an opportunity to be heard or an opportunity to expunge the arrest record.

CONCLUSION

Settled state laws should be followed by the Court of Appeals as mandated by Erie Railroad Co. v. Tompkins. Fifth Circuit Local Rule 21 is contrary to a public duty to say what the law is and provide a meaningful appellate review. District attorneys defending public officials against individuals claiming violation of their civil rights is a patent conflict of interest. An individual guilty of no crimes should be restored to at least his previous position by having an arrest record expunged.

These reasons constitute recurring problems of national significance and therefor writ of certiorari should issue to review judgment and opinion of the Fifth Circuit.

Respectfully submitted,



S. L. Lewis
5614 Richmond Street
Dallas, Texas 75206

Don M. Smart
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Dallas, Texas 75218

CERTIFICATE OF SERVICE

I, S. L. Lewis, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Writ of Certiorari on counsel for Respondents, by depositing same in the United States mail, postage prepaid, on October 29, 1974, addressed to John B. Tolle, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas, 75202 and Gerald Weatherly, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas, 75202 counsel of record for Respondents.

S. L. Lewis

S. L. Lewis

APPENDICES

APPENDIX A: *CONSTITUTIONAL PROVISIONS AND STATUTES*

United States Constitution, Amendment IV, in pertinent part:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

United States Constitution, Amendment V, in pertinent part:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment XIV, in pertinent part:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Federal Rules of Appellate Procedure Fifth Circuit Local Rule No. 21.

> When the court determines that any one or more of the following circumstances exists and is dispositive of a matter

submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

Title 28, United States Code, in pertinent part:

§ 1331. Federal question

(a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States.

Title 28, United States Code, in pertinent part:

§ 1343(3). Civil Rights and elective franchise

(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

Title 42, United States Code, in pertinent part:

§ 1983. Civil Action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Title 42, United States Code, in pertinent part:

§ 1985. Conspiracy to interfere with civil rights Preventing officer from performing duties

Depriving perons of rights or privileges

(3) If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice President, or as a Member of Congress of the United States; or to injury any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

Title 42, United States Code, in pertinent part:

§ 1986. Action for neglect to prevent conspiracy

"Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in the preceding section, 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented, and such damages may be recovered in an action on the case; and any number of persons guilty of such wrongful neglect or refusal may be joined as defendants in the

action, and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding five thousand dollars damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued."

Title 42, United States Code, in pertinent part:

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

Texas Revised Civil Statutes Annotated, with respect to eminent domain, in pertinent part:

Article 3264. The exercise of the right of eminent domain shall in all cases be governed by the following rules:

2. When such statement is filed with the county judge, he shall, either in term time or vacation, appoint three disinterested freeholders of said county as special commissioners to assess said damages, giving preference to those that may be agreed upon between the parties.

3. The commissioners shall be sworn to assess said damages fairly and impartially and in accordance with law.

6. The notices shall be served upon the parties at least ten (10) days before the day set for the hearing, exclusive of the day of the service, and may be served by any person competent to testify, by delivering a copy of such notice to the party, his agent or attorney.

Texas Revised Civil Statutes Annotated, in pertinent part:

Article 332(c). Representation of county officials and employees by district, county or private attorneys

§2. In any suit instituted by a nonpolitical entity against an official or employee of a county, the district attorney of the district in which the county is situated or the county attorney, or both, shall represent the official or employee of the county if the suit involves any act of the official or employee while in the performance of public duties.

Texas Penal Code, in pertinent part:

Article 336. Preventing execution of civil process

Whoever shall prevent or defeat the execution of any process in a civil cause, by any means not amounting to actual resistance, but which are calculated to prevent the execution of such process, shall be fined not exceeding five hundred dollars; evading the execution of such process is not an offense under this article.

Texas Penal Code, in pertinent part:

Article 340. Resisting execution of civil process

Whoever shall wilfully resist or oppose an officer in executing or attempting to execute, any process in a civil cause shall be fined not exceeding five hundred dollars; and if arms be used in such resistance, the punishment shall be doubled.

Texas Penal Code, in pertinent part:

Article 382.

If any justice of the peace, sheriff or other peace officer shall wilfully neglect to return, arrest or prosecute any person com-

mitting a breach of the peace or other crime or misdemeanor which has been committed within his view or knowledge, or shall wilfully absent himself from any place where such crime or misdemeanor is being committed, or is about to be committed, for the purpose of avoiding seeing or having a knowledge of the same, he shall be fined not less than seventy-five nor more than five hundred dollars.

Texas Penal Code, in pertinent part:

Article 1147. An assault or battery become aggravated when committed under any of the following circumstances;

(1) When committed upon an officer in the lawful discharge of the duties of his office, if it was known or declared to the offender that the person assaulted was an officer discharging an official duty.

Texas Code of Criminal Procedure

Article 2.09. Who are magistrates

Each of the following officers is a magistrate within the meaning of this Code: The judges of the Supreme Court, the judges of the Court of Criminal Appeals, the judges of the District Court, the county judges, the judges of the county courts at law, judges of the county criminal courts, the justices of the peace, the mayors and recorders and the judges of the city courts of incorporated cities or towns.

Texas Code of Criminal Procedure

Article 2.10. Duty of Magistrates

It is the duty of every magistrate to preserve the peace within his jurisdiction by the use of all lawful means; to issue all process intended to aid in preventing and suppressing crime; to cause the arrest of offenders by the use of lawful means in order that they may be brought to punishment.

Texas Code of Criminal Procedure

Article 2.13. Duties and powers

It is the duty of every peace officer to preserve the peace within his jurisdiction. To effect this purpose, he shall use

all lawful means. He shall in every case where he is authorized by the provisions of this Code, interfere without warrant to prevent or suppress crime. He shall execute all lawful process issued to him by any magistrate or court. He shall give notice to some magistrate of all offenses committed within his jurisdiction, where he has good reason to believe there has been a violation of the penal law. He shall arrest offenders without warrant in every case where he is authorized by law, in order that they may be taken before the proper magistrate or court and be tried.

Texas Code of Criminal Procedure

Article 14.01(b).

(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

Texas Rules of Civil Procedure

§ 1. Rule 15. Writs and Process

The style of all writs and process shall be "The State of Texas;" and unless otherwise specially provided by law or these rules every such writ and process shall be directed to any sheriff or any constable within the State of Texas, shall be made returnable on the Monday next after expiration of twenty days from the date of service thereof, and shall be dated and attested by the clerk with the seal of the court impressed thereon; and the date of issuance shall be noted thereon.

APPENDIX B:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 73-3879

Summary Calendar*

NANCY GAYLE SMART,

Plaintiff-Appellant,

versus

CLARENCE JONES, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

---

(April 18, 1974)

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

---

* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

[1] See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1973

NO. 73-3879

Summary Calendar*

D. C. Docket No. CA-3-6478

NANCY GAYLE SMART,

Plaintiff-Appellant,

versus

CLARENCE JONES, ET AL.,

Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Texas

Before BROWN, Chief Judge, and THORNBERRY and AINSWORTH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiff-appellant pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

April 18, 1974

Issued as Mandate: June 14, 1974

United States Court of Appeals

FIFTH CIRCUIT

OFFICE OF THE CLERK

EDWARD W. WADSWORTH
Clerk
600 Camp Street
New Orleans, La. 70130

June 6, 1974

TO ALL COUNSEL OF RECORD

Re: 73-3879 SMART V. JONES, ET AL

Gentlemen:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and no member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH
CLERK

By Annie G. Parent
Deputy Clerk

cc: Mr. S. L. Lewis
Mr. Don M. Smart
Mr. John B. Tolle

Supreme Court, U. S.
F I L E D
DEC 2 1974
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-502

NANCY GAYLE SMART, *Petitioner*,

v.

CLARENCE JONES, ET AL, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

HENRY WADE
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-502

NANCY GAYLE SMART, *Petitioner,*

v.

CLARENCE JONES, ET AL, *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

This brief in opposition to the petition for certiorari in this cause is respectfully submitted on behalf of the respondents Clarence Jones, Sheriff of Dallas County, Texas, and J. W. Grandstaff, Gail Barrett and Benny Barrett, Deputy Sheriffs of Dallas County, Texas.

OPINION BELOW

This case was affirmed without opinion by the United States Court of Appeals for the Fifth Circuit, and its decisions are now reported: *Smart v. Jones,* 493 F.2d 663 (panel decision); 495 F.2d 1372 (rehearing en banc denied).

JURISDICTION

The jurisdictional basis is adequately stated in the petition.

STATUTES INVOLVED

Following are the Texas statutes involved in this case:

1.) *Vernon's Annotated Code of Criminal Procedure,* Article 14.01 (Vol. 1, 1974-1975 pocket part, p. 201):

Art. 14.01

(a) A peace officer or any other person, may, without a warrant, arrest an offender when the offense is committed in his presence or within his view, if the offense is one classed as a felony or as an offense against the public peace.

(b) A peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view.

2.) *Vernon's Annotated Civil Statutes,* Article 6701(d), the Uniform Act Regulating Traffic on Highways, in pertinent part:

Sec. 51 (Vol. 19½, 1974-1975 Pamphlet Supplement, p. 166)

(a) Any person who drives any vehicle in willful or wanton disregard for the safety of persons or property is guilty of reckless driving.

Sec. 153 (Vol. 19½, p. 437)

Any peace officer is authorized to arrest without

warrant any person found committing a violation of any provision of this Act.

QUESTIONS PRESENTED

All four of petitioner's "Questions Presented" are seriously and materially misleading:

1.) It is simply untrue that, as petitioner's Question No. 1 implies, the District Court and the Court of Appeals failed to follow the settled state law.

2.) It is also simply untrue that, as petitioner's Question No. 2 implies, the decision by the Court of Appeals made any change whatever in the existing state law.

3.) It is again simply untrue that, as petitioner's Question No. 3 implies, petitioner was deprived of a fair trial or in any way prejudiced by the fact that the respondents were represented by the District Attorney at the trial of this case in the District Court. The record conclusively shows that the criminal charges against petitioner were dismissed six months prior to the trial of this case, and petitioner's complaint in this regard is based on sheer conjecture and speculation.

4.) Finally, it is simply untrue that, as petitioner's Question No. 4 implies, it was or is established that any sort of permanent record of petitioner's arrest, on computer or otherwise, was made. The record contains not a scintilla of evidence on this point.

Hence, particularly as to each and all of petitioner's asserted questions, as well as otherwise, no novel or important question at all is presented by this case.

STATEMENT OF THE CASE

Petitioner's statement of the case, and her discussion of cited Texas decisions, are replete with serious, material misstatements and omissions, and thus are badly misleading – all of which we attribute to partisan zeal, but which we must of course correct. We therefore here restate the case and its facts, with appropriate citations to the Appendix and Transcript of testimony before the Court of Appeals.

The cause arose as a civil rights complaint by petitioner, alleging that respondents had violated her civil rights under 42 USC Secs. 1983, 1985, 1986 and 1988 (A.1). Petitioner did not seek recovery, by pendent jurisdiction, under Texas law. Petitioner alleged that respondents had falsely arrested her without probable cause, had filed false criminal charges against her, and had entered into a conspiracy to injure and harrass her by filing imaginary charges, making arrests, and incarcerating and stamping her with a criminal record. (A. 2-7) The case was tried twice before different juries, the first trial ending in a hung jury on October 1, 1973. (A. iii) The second trial began on October 11, 1973, and the jury returned a verdict for respondents on October 15, 1973. (A. iv) From the judgment entered on the verdict, petitioner appealed to the United States Court of Appeals for the Fifth Circuit. The Circuit Court affirmed without opinion and denied rehearing en banc. *Smart v. Jones*, 493 F.2d 663 and 495 F.2d 1372.

STATEMENT OF THE FACTS

Testimony as to the facts of the case was in sharp dispute.

Deputy Sheriff Grandstaff testified that he went to the residence of one Don Smart in the City of Dallas for the purpose of serving Don Smart with a notice of a condemnation hearing. (A. 39-41) There he encountered Nancy Gayle Smart, the petitioner, to whom he announced his identity and purpose. (A. 43) Petitioner told him that "she didn't give a damn" who he was, to get off the property. (A. 43) Petitioner went into the house and came out in a few minutes with Don Smart. (A. 43) Don Smart got into one of the cars parked by the house and drove across the lawn to get around Grandstaff's car. Grandstaff followed in his car, intending to serve the condemnation notice. (A. 44) Petitioner followed in another car. During the course of the drive along the public streets of Dallas, petitioner recklessly and deliberately tried many times to force Grandstaff's car to the curb, and finally succeeded in doing so. (A. 46) Grandstaff called for assistance over his police radio. (A. 50-51) Other deputy sheriffs, responding to Grandstaff's radio calls, arrested petitioner a few minutes and a few blocks from the spot where she had forced Grandstaff to the curb. The deputy sheriffs prepared reports of the facts and presented them to Assistant District Attorney H. L. Brotherton, who filed the charges complained of by petitioner. (Transcript, pp. 79-80) Petitioner testified that she did not force Grandstaff to the curb, but that Grandstaff actually swung his car violently in front of hers and blocked the path of both herself and of Don Smart. (Transcript, p. 144) The jury made its credibility choices and found in favor of Grandstaff and the other defendants.

ARGUMENT

I.

THE DISTRICT COURT AND THE COURT OF APPEALS PROPERLY FOLLOWED THE SETTLED STATE LAW.

Notwithstanding petitioner's strident contentions, the record conclusively shows that the District Court and the Court of Appeals properly followed and applied the settled state law.

1.) It is well-settled in Texas, as in most jurisdictions, that:

> "The question of whether probable cause exists at the time of the arrest (or search) can only be decided by the concrete factual situation presented by each individual case —."
>
> *Lerma v. State*, 491 SW 2d 152, 154 (1973), citing *Beck v. Ohio*, 379 US 89, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964), and *Henry v. U.S.*, 361 US 98, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959).

It is thus apparent that petitioner's reliance on the decision in *Rodriguez v. State*, 172 SW 2d 502 (1943) is misplaced, because the "concrete factual situation" presented by *Rodriguez* bears not the slightest resemblance to the facts presented by this case.

2.) It is further well-settled in Texas, contrary to petitioner's contentions, that probable cause is enough to justify an arrest for a misdemeanor, even when the person arrested is not actually guilty of an offense. *Henderson v. State*, 422 SW 2d 175, cert. den. 90 S.Ct. 1709, 398 US 912, 26 L.Ed.2d 73.

3.) The test of probable cause is the same in Texas as in most jurisdictions:

> "— whether, at the moment of arrest, the facts and circumstances within the knowledge of the arresting officer and of which he has reasonably trustworthy information would warrant a reasonable and prudent man in believing that a particular person has committed or is committing a crime."

Lerma v. State, supra, p. 154.

4.) It is again well-settled in Texas that if an officer who initiates a request for an arrest is in possession of sufficient knowledge to constitute probable cause, he need transmit to the arresting officer only such information as is necessary for the arresting officer to know who is wanted. *Weeks v. State*, 417 SW 2d 716. The test as to probable cause for arrest in such a situation is the information known to the officer who requests the other officer to effect the arrest. *Miller v. State*, 442 SW 2d 340; *Merriweather v. State*, 501 SW 2d 887. An arresting officer who does not himself possess probable cause for arrest has the right to act upon the basis of a police radio broadcast requesting arrest and is entitled to assume that the officer who requests the arrest has sufficient probable cause to justify it. *Muggley v. State*, 473 SW 2d 470. This is the rule announced by this Court in *Whiteley v. Warden, Wyoming State Penitentiary*, 401 US 560, 568, 91 S.Ct. 1031, 1037, 28 L.Ed.2d 306 (1971).

5.) Again contrary to petitioner's contentions, The Texas law is that probable cause for arrest is determined by objective facts, and the arresting officer's subjective opinion is not material, and that, where the objective facts show that an officer had probable cause to arrest for one misdemeanor

(drunkenness), the fact that the officer relied upon another misdemeanor offense for which he had no probable cause to arrest (driving while intoxicated), did not vitiate the arrest. *Fletcher v. State*, 298 SW 2d 581. This is, of course, the same standard announced by this Court and by the Courts of Appeal. *Terry v. Ohio*, 392 US 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); *Klingler v. United States*, 409 F.2d 299 (8th Cir. 1969); *United States v. Saunders*, 476 F.2d 5 (5th Cir. 1973).

Applying the foregoing well-settled legal principles to facts of this case, it is at once apparent that petitioner's arrest by the respondent deputy sheriffs was lawful. When petitioner drove her car in the manner described by Grandstaff, recklessly and deliberately forcing his car to the curb on a public street, Grandstaff had ample probable cause to believe that petitioner was guilty of the offense of reckless driving in violation of Art. 6701(d), Sec. 51, V.A.C.S., and was authorized to arrest her without a warrant by virtue of the provisions of Art. 6701(d), Sec. 153. He also had such authority to arrest by virtue of the provisions of Art. 14.01(a) and (b) of the Texas Code of Criminal Procedure. It should be noted here that the testimony showed that Grandstaff intended to arrest Don Smart also after petitioner curbed Grandstaff's car, because Don Smart had operated his car in such a reckless manner during the time that they were proceeding on the public streets that Grandstaff had almost collided with Don Smart's car. (Transcript, p. 306) Since it was impossible for Grandstaff to follow two cars going in different directions, it was perfectly reasonable for him to radio for assistance. Since the facts and circumstances known to Grandstaff, when judged by an

objective standard, furnished him with ample probable cause to arrest petitioner, the arrest, which was effected by other deputies who were responding to Grandstaff's radio calls, was lawful. *Weeks v. State*, 417 SW 2d 716; *Miller v. State*, 442 F.2d 340; *Muggley v. State*, 473 SW 2d 470. Contrary to petitioner's contentions, the foregoing legal principles have the same application to misdemeanor offenses as they do to felony offenses.

Further contrary to petitioner's contentions, the Courts below did not make any change in the Texas law concerning the nature of a notice of a condemnation hearing. Petitioner argues at length that such a notice is not "civil process", and cites the appropriate Civil Rule and analagous civil cases from the Texas appellate courts in support of her contention. But petitioner fails to note that, in criminal prosecutions, the Texas Court of Criminal Appeals holds that a different rule applies, and that the process which will support a criminal prosecution is process which is fair on its face, and defines such as:

> "— that process may be said to be fair on its face which proceeds from a Court, magistrate, or *body having authority to issue process of that nature — . The word 'process' is made use of in this rule in a very comprehensive sense —.*" (Emphasis added.)
>
> *Witherspoon v. State*, 61 SW 396, at 398.

Petitioner does not seriously assert that the condemnation commissioners were not a "body having authority to issue" a notice of a condemnation hearing; indeed, the opposite is conclusively shown from the record and from the authorities cited by petitioner. The inescapable conclusion is that

the notice of the condemnation hearing which Grandstaff was endeavoring to serve on Don Smart was a "civil process" as far as the Texas criminal law is concerned, and that Grandstaff had probable cause to believe that petitioner was guilty of interfering with the service of it.

Petitioner next argues that the Sheriff and his deputies had no authority to serve such a notice of a condemnation hearing, and cites as authority an opinion by the Attorney General of Texas. (Petition, p. 12). Quoting only a small portion of such opinion, petitioner asserts that the same stands for the proposition that the Sheriff may not serve a notice of a condemnation hearing. We have reproduced in full in the Appendix to this brief the Opinion in question, so that the Court may see how misleading petitioner's isolated quotation is. A fair reading of the opinion shows that it concerns how and when various costs are taxed and collected in a condemnation proceeding, and it specifically states that, if the Sheriff does serve notices in a condemnation hearing, he should collect his costs through the proceeding and not through the clerk. (Opinion, p. 15, Item *J*)

We do not understand how petitioner can say that this opinion is any authority whatever for her contention that the Sheriff was without authority to serve such notice; and no Texas court has ever so held.

What we have said immediately above concerning the definition of "civil process" which will support a criminal prosecution in Texas, as well as the right of the Sheriff to serve a notice of a condemnation hearing, is intended to

correct what we feel are errors of law and of fact in the petition; the most important point in this case is that the questions as to whether or not the Sheriff and his deputies were authorized to serve the notice of a condemnation hearing, and whether or not such notice was a "civil process" for the purpose of a criminal prosecution, were not controlling issues in the trial or appeal, and are not the controlling issues here. The reason that they are not controlling is because the respondent deputies arrested petitioner for her *conduct* in forcing Grandstaff's car to the curb while he was driving on a public street; the deputies then made full reports of the *facts* and presented the same to Assistant District Attorney Brotherton, and it was Brotherton, not the deputy sheriffs, who selected the charges to be filed and who filed such charges by information. (Transcript, 77-81; A. 88-90, 92-95) Having thus made a full and fair disclosure to the Assistant District Attorney of all of the *facts*, the respondents could not be held liable for any errors that the latter may have committed in selecting and filing charges based on those facts. This is the well-settled Texas law, as well as the prevailing law throughout the country *Ada Oil Co. v. Dillaberry*, 440 SW 2d 902; 54 C.J.S. *Malicious Prosecution*, Secs. 48(b) – 53. Thus all of petitioner's extended arguments concerning the charges against her were and are not relevant to her claim against the respondents. It is not correct to say (as does the petition, p. 4) that charges were filed against petitioner in a "non-attorney justice of the peace court –." The record conclusively shows that the only charges filed against petitioner were filed by the Assistant District Attorney, who presented the same by information, as shown above.

II.

PETITIONER WAS NOT DEPRIVED OF A FAIR TRIAL OR PREJUDICED IN ANY WAY BECAUSE THE DISTRICT ATTORNEY REPRESENTED RESPONDENTS AT THE TRIAL OF THIS CAUSE.

As we have stated above, petitioner's claim in this regard is based entirely upon conjecture and speculation, and there is no basis in the record to support it. It is completely false to say (as does the petition, p. 6), that petitioner protested at "all times before the trial and appellate courts" the District Attorney's representation of respondents in this case (as the state law requires him to do.) The truth of the matter is that petitioner did not raise any protest whatever from the time that the answer was served on November 28, 1972, until October 9, 1973, (A. 36) a date some eight days after the first trial had ended in a hung jury, and less than two full days before the case was set for re-trial on October 11, 1973. It should also be noted that the criminal charges against petitioner had been dismissed in April, 1973, some six months prior to the trial of this case, and petitioner's complaint that she was being prosecuted at the same time that this case was tried is untrue.

CONCLUSION

The record in this case reflects that the lower courts properly followed and applied the state law and did not make any purported changes in it; that petitioner was not prejudiced by the fact that the District Attorney represented the respondents in the trial of this case; and that petitioner has no standing to complain about the failure to

order expungement of her record, as no such record has been shown to have been made.

WHEREFORE, respondents pray that the writ of certiorari be denied.

Henry Wade

HENRY WADE
Criminal District Attorney
Dallas County, Texas

John B. Tolle

JOHN B. TOLLE
Assistant District Attorney
Dallas County Courthouse
Dallas, Texas 75202
Attorneys for Respondents

CERTIFICATE OF SERVICE

I, John B. Tolle, a member of the Bar of the Supreme Court of the United States, do hereby certify that I have served copies of the foregoing Brief in Opposition to Petition for Certiorari on counsel for Petitioner, by depositing the same in the United States Mail, first-class postage prepaid, on this the 27 day of November, 1974, addressed to S. L. Lewis, Esq., 5614 Richmond Street, Dallas, Texas 75206; and to Don M. Smart, 10611 Garland Road, Dallas, Texas 75218, as counsel of record for Petitioner.

John B. Tolle

JOHN B. TOLLE

APPENDIX

THE ATTORNEY GENERAL OF TEXAS

Austin 11, Texas

October 17, 1963

Honorable Henry Wade
Criminal District Attorney
Dallas County
Dallas, Texas

Opinion No. C-164
Re: Proper items of court costs and costs in condemnation proceedings.

Dear Mr. Wade:

We have your letter in which you request an opinion pertaining to proper items of court costs and costs in condemnation proceedings.

You enclose a copy of a Bill of Cost in a condemnation suit containing fees for the County Clerk, Sheriff and County Judge, which items you have marked "A — L" inclusive and are as follows:

A — Taxing cost	.50
B — Filing and Docketing	1.00
C — Recording Notice of Lis Pendens	2.00
D — Filing four notices	1.00
E — Filing one notice	.25
F — Filing intervention of County	.25
G — Award of Special Commissioners	.25
H — Order to withdraw funds	1.25
I — Judgment	8.00

The above items A — I are for the County Clerk.

J — Sheriff fees for serving notices	16.00
K — County Judge fee	3.00
L — County Law Library fund	1.50

Honorable Henry Wade, Page 2 (Opinion No. C-164)

You submit the following questions:

"1. Which of the items listed are proper Court costs?

"2. Which of the items listed are costs of the proceeding?

"3. If any of the items listed are held to be not included in either (1) or (2) above, can the office holder performing the service be legally reimbursed for the work done as services rendered?"

You state that in view of our Opinion No. WW-1008 dated March 7, 1961, it appears to you that Items *G*, *H*, and *I* are proper court costs; that under Articles 6640 and 6641, V.A.C.S., Item *C* appears to be a proper item of cost; that under Article 3912e, it appears that Items *A*, *B*, *D*, *E*, *J*, and *K* are costs of the proceeding; and that Item *L* appears to be neither a cost of a proceeding nor a court cost. You do not express an opinion as to Item *F*.

It appears to us that our Opinion No. WW-1008 answers all the questions propounded by you and we shall briefly review that opinion, the pertinent parts of which are substantially as follows:

1. The Petition or Statement of Condemnation is filed with the County Judge who appoints the Commissioners. (Article 3264, Sec. 2). Neither the Judge, Clerk, nor Sheriff has anything whatever to do with the proceeding thereafter until the Commissioners file their award or decision with the Judge as provided by Article 3265(5).

2. If no objections to the award are filed, then the only fees of office that any officer can collect are those by the Clerk who is entitled to three fees in the amount allowed by law for (1) filing the decision or award,

(2) for recording the award, and (3) for recording the judgment which the County Judge has made by making the award the judgment of the court. These are the only fees of office that can be charged by any officer if no objections to the award are filed. If a Lis Pendens Notice is filed the Clerk will collect the fee provided by law, not as court costs nor as costs of the proceeding, but as a fee for filing and recording instruments.

3. If the condemnor does not pay the damages directly to the condemnee, but pays same into court as provided by Art. 3268(1), and the money is withdrawn by the condemnee, there is no fee to be collected by any officer. The money is not withdrawn by an order of the court, but only by an order of the condemnee. There is no provision in law for paying the Clerk any compensation for this service.

4. If objections to the award are filed, then the proceeding become a civil cause as provided by Art. 3266(6), and the officers are allowed to charge the regular fees allowed by law for services in a civil cause. If the Clerk is required to issue citations, he is authorized to charge a fee allowed by law for such service. If the Sheriff or Constable is required to serve citations, he is authorized to collect the fees allowed by law for such service. This is the first time that the Sheriff has anything to do with the condemnation proceeding. If objections are filed, the cause becomes a civil cause, and the Judge is allowed to collect the fee provided by law for each civil case.

FIRST AND SECOND QUESTIONS

We believe that the first two questions propounded by you may better be answered by giving our opinion as to each item mentioned by you as follows:

Items A and B are proper court costs for the Clerk only if objections to the award or decision are filed and the Clerk

sets up the proceeding as a civil cause. If no objections to the award are filed, then such items are not a proper charge in any case.

Item C is not a proper item of court costs or costs of the proceeding. The party filing a Lis Pendens Notice, even if Honorable Henry Wade, Page 4 (Opinion No. C-164) the State or County, under Art. 3219e, V.C.E., is now required to pay the recording and filing fee to the Clerk.

Items D, E, and F are not proper items of court costs or costs of the proceeding. These are services to be performed by the Commissioners who are paid for all services as provided by Art. 3266(3), V.C.S. *Item F* is a proper item of court costs if the intervention is filed after objections to the award are filed.

Item G is a proper item of costs in every case. In addition to this, the Clerk is, in every case, entitled to a fee for recording the award if that is done. If the judgment and award are combined in one instrument, then only one fee is charged.

Item H is not a proper item of court costs or costs of the proceeding. The law does not make any provision for any fee for such service even if the money is handled by the Clerk.

Item I is a proper item of costs in every case. However, we cannot say that the amount of $8.00 set out is a proper amount. Art. 3930, V.C.S., sets the *amount* of the fee.

Item J is not a proper item of court costs. It is a proper item of costs of the proceeding. Under Art. 3264(6), V.C.S., the notices may be served by any person competent to

testify. If the Sheriff performs this service he should collect his compensation through the proceeding and not through the Clerk.

Items K and L are proper items of court costs only if objections to the award are filed and if the proceeding becomes a civil cause. If no objections are filed, the County Judge does not receive any compensation whatever and no library fee is charged.

THIRD QUESTION

You quote Section 1 of Article 3912e, V.C.S., and underline and emphasize the last clause or proviso of said Article as follows:

> "Section 1. No district officer shall be paid by the State of Texas any fees or commissions for any service performed by him; nor shall the State or any county pay to any county officer in any county containing a population of twenty thousand (20,000) inhabitants or more according to the last preceding Federal Census any fee or commission for any service by him performed as such officer; provided, however, that the assessor and collector of taxes shall continue to collect and retain for the benefit of the Officers' Salary Fund or funds hereinafter provided for, all fees and commissions which he is authorized under law to collect; and it shall be his duty to account for and to pay all such moneys received by him into the fund or funds created and provided for under the provisions of this Act; provided further, that the provisions of this Section shall not affect the payment of costs in civil cases or eminent domain proceedings by the State, but all such costs so paid shall be accounted for by the officers collecting the same, as they are required under the provisions of this Act, to account for fees, commissions and

> *that the provisions of this Section shall not affect the payment of fees and commissions by the State or County for services rendered by County Officers in connection with the acquisition of rights of way for public roads or highways, and provided that such fees and commissions shall be deposited into the Officers' Salary Fund of the County by the County Officer collecting such fee. As amended Acts 1959, 56th Leg., p. 35, ch. 23, § 1."*

Prior to the amendment of 1959, Article 3912e prohibited the payment of compensation to district and county officers for any services performed by such officers for the State or County in condemnation proceedings (other than civil causes) or such services as filing and recording instruments (such as Lis Pendens) and furnishing certified copies of instruments.

After quoting the above provision, you make the following statement pertaining to it:

Honorable Henry Wade, Page 6 (Opinion No. C-164)

> "It is clear that Section 1, Article 3912e, V.A.C.S., intends for County officers to be reimbursed for all services rendered in connection with the acquisition of rights of ways for public roads or highways. Therefore, if the above listed items are held to not be Court costs or costs of the proceeding, they are surely reimbursable as services rendered under the above statute."

We do not agree with your interpretation of Article 3912e as above quoted. We believe that it is clear that the amendment to Article 3912e was only to allow officers to collect the fees allowed by law for any services in connection with condemnation suits which they were not allowed to collect before the amendment, and that said amendment was not intended to allow the officers to collect for a service that

they are *not required to render*, or any compensation for any service they *are required to render* for which no compensation is provided by law. See the authorities cited in Opinion No. WW-1008.

The fact that an officer might for convenience do some of the work required of the Judge or Commissioners appointed by him does not authorize the payment of compensation not provided by law. In order to receive compensation, the service rendered by the officer must be required of him and in addition thereto the law must provide for payment of same.

We believe that this sufficiently answers your third question.

SUMMARY

This opinion pertains to the fees or compensation of officers for services in eminent domain proceedings.

Yours very truly,

WAGGONER CARR
Attorney General of Texas

H. GRADY CHANDLER
Assistant

HGC/jp

Honorable Henry Wade, Page 7 (Opinion No. C-164)

APPROVED:

OPINION COMMITTEE
W. V. Geppert, *Chairman*

J. C. Davis
Malcolm Quick
William Osborne
Leslie King

REVIEWED FOR THE ATTORNEY GENERAL
By: Stanton Stone

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-502

NANCY GAYLE SMART, *Petitioner*

v.

CLARENCE JONES, ET AL., *Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR REHEARING

The Petitioner herein respectfully moves this Court for an order (1) vacating its denial of the Petition for Writ of Certiorari, entered on December 23, 1974, and (2) granting the Petition. As grounds for this motion, Petitioner states the following:

STATEMENT OF THE CASE

A woman of "small means" was subjected to a custodial arrest without a warrant, handcuffed behind her back in

a violent manner, her car confiscated, and she was carried around in a squad car for more than an hour before being brought before a magistrate. The Respondent claiming to have witnessed the traffic offense of reckless driving, now alleged to be the basis of probable cause, drove away without offering a traffic citation while she was stopped in his presence. The custodial arrest was made at a different time and place by other officers. This is a prototype of the case which Chief Justice Burger must have been referring to in his Report on the Federal Judicial Branch, 60 ABAJ 1193, 1194 (Oct. 1974), when he stated:

> ". . . the means of making the system of justice more responsive to the needs of people of small means and of the problems which have seemed too modest to engage the attention of lawyers. Few things rankle in the human breast so deeply as a sense of injustice.

It has been set forth by Respondents in a firm and unequivocable manner for the first time in their Brief in Opposition before the Supreme Court of the United States what alleged infraction of law was the basis upon which their defense of probable cause for custodial arrest without a warrant stood. The Assistant Criminal District Attorney, as their counsel, has come to rest solely on Art. 6701(d), Sects. 51 and 153 of Tex. Rev. Civ. Stat. Ann. Respondents' total defense for the first time now rests upon a minor traffic violation. This constitutes an abandonment, waiver, and admission of lack of merit of the previous defense set forth that Petitioner had violated five articles of the Texas Penal Code. A confession of error has now been admitted as to all prior court proceedings.

The trial court record was completely devoid of any suggestion that Respondents' defense rested upon a minor traffic violation. Neither Petitioner, Judge, nor Jury were presented with the real basis of probable cause to arrest without a warrant. Petitioner has been denied her constitutional rights pursuant to the Fourth, Eighth and Fourteenth Amendments to the Constitution of the United States on the trial of this case.

At every stage of this proceeding Petitioner has had to meet constantly changing defenses which were not pleaded in accordance with Fed. R. Civ. P. 8(c). The chronological history of this case is as follows:

Sept. 11, 1972: Petitioner was charged with violation of Arts. 336 and 1147 of the Texas Penal Code with a bond of $500.00 for each charge. She was placed in jail and the Dallas County Criminal District Attorney filed formal charges.

Nov. 11, 1972: Petitioner filed this federal civil rights suit and Assistant Criminal District Attorney John B. Tolle, who is normally in charge of civil litigation, became the special prosecutor in state criminal court, presumably to line up his defense in the civil suit. His answer for Respondents in the civil suit pleaded violations of Arts. 340 and 1147, Texas Penal Code. He continued to prosecute Petitioner on Arts. 336 and 1147, Texas Penal Code, until he dismissed all charges on April 23, 1973.

Sept. 25, 1973: The first trial in Federal District Court, Cause No. 3-6478-B, resulted in a hung jury. Respondent pleaded Arts. 340 and 1147.

Texas Penal Code; such a defense was presented in the charge to the jury as a basis of probable cause.

Nov. 11, 1973: The second trial of this cause with a verdict for Respondents was based upon the same defenses. (Sup. A. 10, 11, 12, 13, 14, and 15)

Jan. 26, 1974: Dallas County Assistant Criminal District Attorney John B. Tolle in Respondents' Brief to the Fifth Circuit waived and abandoned any contention of a violation of Arts. 336, 340, and 1147, Texas Penal Code, and raised for the first time violations of Arts. 1138 and 1139, Texas Penal Code, and Art. 6701(d), Sect. 51, Tex. Rev. Civ. Stat. Ann.

Nov. 27, 1974: Respondents' Brief in Opposition No. 74-502 filed in this Honorable Court set forth at page 8: "Grandstaff had ample probable cause to believe that Petitioner was guilty of the offense of reckless driving in violation of Art. 6701(d), Sec. 51, V.A.C.S., and was authorized to arrest her without a warrant by virtue of the provisions of Art. 6701(d), Sec. 153."

Respondents' Brief thereby admitted by waiver and abandonment, that Petitioner had not violated any penal statutes as previously contended.

In summary, Petitioner was prosecuted in County Criminal Court No. 2, Dallas County, Texas, for eight months for alleged violations of Arts. 336 and 1147, Texas Penal Code. Three months subsequent to her arrest, Art. 336 was waived and abandoned and Art. 340 was substituted as a defense to her civil rights suit by Respondents,

although there was a continuing prosecution for violation of Art. 336 for five more months before it was dismissed. Sixteen months after her arrest, Respondents' Brief No. 73-3879 in the Fifth Circuit abandoned and waived any violation of Arts. 336, 340, and 1147, Texas Penal Code, and based their probable cause on alleged violations of Arts. 1138 and 1139, Texas Penal Code, and added Art. 6701(d), Sect. 51, Tex. Rev. Civ. Stat. Ann. Now, *two years and three months after her arrest,* Respondents have arrived at the final resting point and foundation for their probable cause to arrest without a warrant, which is merely a minor traffic violation. The treatment inflicted upon Petitioner, now conclusively founded upon a minor traffic violation, is prima facie evidence of violation of her federally protected civil rights. This is an admission by Respondents and their attorney of their complete lack of good faith throughout these proceedings. Petitioner, who was taking her child to school and on her way to work, was custodially arrested without a warrant, forcibly handcuffed behind her back with resulting serious injury, taken before a JP Court and denied the opportunity to have an attorney represent her, bond was set at $1,000.00, she was incarcerated in jail, mug shot and fingerprinted, and her car was confiscated, all of which was based on a minor traffic violation. This raises the question whether the present system of justice is sufficiently responsive to the needs of people of "small means" to correct gross miscarriage of justice and to prevent abuse of power by public officials.

REASONS TO VACATE

1. RESPONDENTS' BRIEF IN THIS HONORABLE

COURT ESTABLISHED FOR THE FIRST TIME BASIS OF PROBABLE CAUSE FOR PETITIONER'S ARREST.

At every stage of this proceeding Petitioner has been faced and required to meet new allegations of criminal offenses with which she was never charged or prosecuted. The trial of this case was based upon Defendants' Original Answer which stated:

> "Defendants J. W. Grandstaff, Benny Barrett and Gail Barrett would further show that on or about September 11, 1972, while the said J. W. Grandstaff was attempting to perform his duty of serving civil process, plaintiff forcibly interfered with his performance of such duty and committed an aggravated assault upon the said J. W. Grandstaff, all in violation of provisions of Articles 340 and 1147 of the Texas Penal Code. Said defendants would further show that they arrested plaintiff pursuant to the provisions of Article 14.01(b), V.A.C.C.P." (A. 11)

Respondents' Brief before this Honorable Court states:

> ". . . Grandstaff had ample probable cause to believe that petitioner was guilty of the offense of reckless driving in violation of Art. 6701(d), Sec. 51, V.A.C.S., and was authorized to arrest her without a warrant by virtue of the provisions of Art. 6701(d), Sec. 153."

The defense now urged by Respondents before this Honorable Court was unknown at the time of trial to Petitioner, Judge, or Jury.

There was no valid judgment based upon matters not before the trial court. Respondents have abandoned and waived all previous defenses to support probable cause.

Respondents' abandonment and waiver of all other previous defenses constitutes a confession of error as to the trial court judgment.

2. RESPONDENTS' BRIEF IN THIS HONORABLE COURT PRESENTS VIOLATION OF ART. 6701(d), SEC. 51, TEX. REV. CIV. STAT. ANN., AS AN AVOIDANCE OR AFFIRMATIVE DEFENSE AND THIS DEFENSE WAS NOT PLEADED IN THE TRIAL AS REQUIRED BY FED. R. CIV. P. 8(c).

In two trials of this case Respondents pleaded their affirmative defense of violation of Arts. 340 and 1147, Texas Penal Code, and Art. 14.01(b) Tex. Code Crim. P. in accordance with Fed. R. Civ. P. 8(c). (A. 17, 18) It can now be seen for the first time what the true basis of their defense of probable cause was and this basis, Art. 6701(d), Sec. 51, Tex. Rev. Civ. Stat. Ann., was not set forth as required by Fed. R. Civ. P. 8(c). This is prima facie denial of due process. The avoidance or affirmative defense based on Art. 6701(d), Sec. 51, Tex. Rev. Civ. Stat. Ann., was not before the trial court. Respondents' Brief in this Court is a contradiction and denial of the affirmative defenses set forth before the trial court.

3. GOOD FAITH IS A CO-EQUAL AND NECESSARY ELEMENT TO PROBABLE CAUSE WHICH MUST BE AFFIRMATIVELY PLEADED AND PROVEN BY RESPONDENTS.

Respondents did not raise in their Original Answer, or at any state of this proceeding, good faith as to probable cause to arrest without a warrant. (A. 17, 18) This is a further violation of Fed. R. Civ. P. 8(c).

The complaining and initiating Respondent, Deputy Sheriff J. W. Grandstaff, had approximately 350 hours of police academy instruction as to the proper performance of the duties of his office. (A. 57) J. W. Grandstaff had the opportunity, at the time of what is now admitted before this Court to be a minor traffic offense, to issue a traffic citation to Petitioner, but he refused to do so and drove away. (A. 59, 60) This same Deputy Sheriff broadcast on the police radio an order, " . . . put this woman in jail." (A. 61) No charges were stated to Petitioner when arrested and handcuffed behind her back by the arresting Respondent Benny Barrett acting on the broadcast order. (A. 68)

Respondents' own authority, *Ada Oil Co. v. Dillaberry*, 440 S.W.2d 902, 910 (CA 1969, reh. den. 1969, writ err. dism'd.), which is the unquestioned rule in the State of Texas, states:

> "Texas courts have uniformly applied the rule that a party filing or causing the filing of a criminal complaint does so upon probable cause where he, in good faith, makes a full and fair disclosure of the facts and circumstances known to him and the complaint is thereafter filed. *Sebastian v. Cheney*, 86 Tex. 497, 25 S.W. 691; *Missouri, K. & T. Ry. Co. of Texas v. Groseclose*, 50 Tex. Civ. App. 525, 110 S.W. 477, no writ hist.; *Andrews v. Dewberry*, 242 S.W.2d 685 (Tex. Civ. App.), writ ref., n.r.e. The above rule is not applicable unless the party filing the complaint acts in good faith in disclosing to the prosecuting attorney all facts known to him, and if defendant knows that plaintiff is not guilty of a criminal offense, probable cause does not exist, and a suit for malicious prosecution may be main-

tained if other elements are proven. See *J. C. Penney Co. v. Gilford*, 422 S.W.2d 25 (Tex. Civ. App.), writ ref., n.r.e."

In the joint efforts of the Respondents, the Criminal District Attorney of Dallas County, Texas and his staff, as shown in the record of this case, have tried with great resourcefulness to extricate themselves from the difficulties resulting from their enthusiastic approach to file untenable and exaggerated criminal charges against Petitioner. For the benefit of their clients this same District Attorney and his Assistant John B. Tolle, voluntarily and deliberately interjected their public office and official conduct into the case by presenting to the jury that the criminal charges filed against Petitioner were wrong, and that correct charges could be filed. (A. 72, 73) No charges, correct or incorrect, have been filed by the Criminal District Attorney against Petitioner and cannot be filed because the statute of limitations has run, Art. 12.05, Tex. Code Crim. P. Moreover, the Assistant District Attorney acting under his official title stated before the jury, it was the responsibility and duty of Petitioner to prove her innocence. This was objected to, but overruled, to which Petitioner excepted. (A. 72)

Even this last ditch stand of grasping at the straw of a minor traffic offense in the civil code is not made in good faith or is available to Respondents as they have made no gesture of compliance with the requisites of an arrest pursuant to that code, e.g., issuance of a traffic summons. This is specifically set out in Tex. Rev. Civ. Stat. Ann., Art. 6701(d), Sects. 147 and 148. (see addendum)

There is no evidence in the record to justify the treatment inflicted upon Petitioner under 6701(d), (traffic regulation), Tex. Rev. Civ. Stat. Ann.

This Honorable Court's attention, as further evidence of the lack of good faith by Respondents and their counsel, is directed to Respondents' Brief before this Court at page 9, *Witherspoon v. State*, 61 S.W. 396, at 398 which is misquoted by omitting "of law."

4. THERE IS PENDENT JURISDICTION IN THE FEDERAL COURT FOR PETITIONER'S CAUSE OF ACTION.

The doctrine of pendent jurisdiction permits the consideration of the related state claims, *Moore v. County of Alameda*, 411 U.S. 693; *Mine Workers v. Gibbs*, 383 U.S. 715.

5. RESPONDENTS' PRESENT DEFENSE PRESENTS PRIMA FACIE EVIDENCE OF SUMMARY PUNISHMENT INFLICTED UPON PETITIONER.

The question of summary punishment did not arise before Respondents filed their Brief before this Honorable Court. The admission that Respondents' only defense rests on Art. 6701(d), Sect. 51, (traffic regulations), Tex. Rev. Civ. Stat. Ann. is, as a matter of law, a confession of the illegal and wrongful interference with Petitioner's liberties and was to inflict summary punishment upon Petitioner without due process of law contrary to the Eighth and Fourteenth Amendments to the Constitution of the United States. The punishment inflicted bears no relation, and is unconscionable, to the defense now pleaded, *Hampton v.*

City of Chicago, Cook County, Illinois, 484 F.2d 602 (7th Cir. Aug. 24, 1973); 415 U.S. 917 (cert. den. Feb. 19, 1974); *Anderson v. Nosser*, 456 F.2d 835 (5th Cir. Mar. 3, 1972); 409 U.S. 848 (cert. den. Oct. 10, 1972).

6. THE ABA CODE OF PROFESSIONAL RESPONSIBILITY MUST BE UPHELD IN FEDERAL COURTS IF THE PUBLIC AND THE BAR IS TO TAKE THEM SERIOUSLY.

On August 14, 1964 at the request of President Louis F. Powell, Jr., the ABA House of Delegates created a special committee on ethical standards to examine the current canons and make recommendations for changes. The present canons are an outgrowth of that work.

Petitioner repeats and reiterates point 3 of Reasons for Granting the Writ in her Petition for Writ of Certiorari in which the actions and conduct of the Dallas County District Attorney's office was contrary to the ABA Code of Professional Responsibility.

CONCLUSION

The trial and appellate federal courts in this case have laid down the rule of law that good faith on the part of law enforcement officers need not be pleaded or proven to sustain a judgment in their favor based on the defense of probable cause.

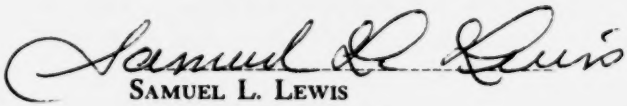
This holding endorses cooperation between a criminal district attorney and sheriff to create a defense in which the law enforcement and prosecutor's office of the state use their power and authority to invalidate 42 U.S.C. 1983.

This case creates precedent that a defendant can abandon trial defenses and interject new, strange, and unrelated defenses at every stage of the appellate proceeding in the federal courts.

This case involves a woman of "small means" and whether the present system can protect people of "small means" from denial of due process of law and summary punishment by public officials who abuse their power.

For the reasons set forth above, as well as those contained in the Petition for Writ of Certiorari, Petitioner prays that this Court grant rehearing of the Order of Denial, vacate that Order, grant the Petition and review the judgment and opinion below.

Respectfully submitted,



SAMUEL L. LEWIS
5614 Richmond Street
Dallas, Texas 75206

DON M. SMART
10611 Garland Road
Dallas, Texas 75218

CERTIFICATE

This is to certify this Petition for Rehearing is filed in good faith, in the firm belief matters herein presented are fundamental and meritorious; and the same is not urged to cause delay but in the interest of substantial justice and is restricted to the grounds specified in Rule 58(2).

Samuel L. Lewis

SAMUEL L. LEWIS

CERTIFICATE OF SERVICE

I, Samuel L. Lewis, a member of the Bar of the Supreme Court of the United States, hereby certify that I have served the foregoing Petition for Rehearing on counsel for Respondents, by depositing same in the United States mail, postage prepaid, on January 14, 1975, addressed to John B. Tolle, Assistant District Attorney, Dallas County Courthouse, Dallas, Texas, 75202, and Henry Wade, Criminal District Attorney, Dallas County Courthouse, Dallas, Texas, 75202, counsel of record for Respondents. All parties required to be served have been served.

Samuel L. Lewis

SAMUEL L. LEWIS

ADDENDUM

CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution, Amendment IV, in pertinent part:

Appearing in Petition for a Writ of Certiorari, p. 27.

United States Constitution, Amendment V, in pertinent part:

Appearing in Petition for a Writ of Certiorari, p. 27.

United States Constitution, Amendment XIV, in pertinent part:

Appearing in Petition for a Writ of Certiorari, p. 27.

Federal Rules of Appellate Procedure Fifth Circuit Local Rule No. 21:

Appearing in Petition for a Writ of Certiorari, p. 27.

Title 28 United States Code, in pertinent part:

Sect. 1343(3) Appearing in Petition for a Writ of Certiorari, p. 28.

Title 42, United States Code, in pertinent part:

Sect. 1983 Appearing in Petition for a Writ of Certiorari, p. 28.

Sect. 1985 Appearing in Petition for a Writ of Certiorari, p. 28-29.

Sect. 1986 Appearing in Petition for a Writ of Certiorari, p. 29.

Sect. 1988 Appearing in Petition for a Writ of Certiorari, p. 30.

Texas Penal Code, in pertinent part:

Art. 336 Appearing in Petition for a Writ of Certiorari, p. 31.

Art. 340 Appearing in Petition for a Writ of Certiorari, p. 31.

Art. 1147 Appearing in Petition for a Writ of Certiorari, p. 32.

Texas Revised Civil Statutes Annotated, in pertinent part: Art. 6701(d)

Sec. 147. Whenever any person is arrested for any violation of this Act punishable as a misdemeanor, the arrested person shall be immediately taken before a magistrate within the county in which the offense charged is alleged to have been committed and who has jurisdiction of such offense and is nearest or most accessible with reference to the place where said arrest is made, in any of the following cases:

1. When a person arrested demands an immediate appearance before a magistrate;

2. When the person is arrested upon a charge of negligent homicide;

3. When the person is arrested upon a charge of driving while under the influence of intoxicating liquor or narcotic drugs;

4. When the person is arrested upon a charge of failure to stop in the event of an accident, causing death, personal injuries, or damage to property;

5. In any other event when the person arrested refuses to give his written promise to appear in court as hereinafter provided.

Notice to appear in court; promise to appear

Sec. 148. (a) Whenver a person is arrested for any violation of this Act punishable as a misdemeanor, and such person is not immediately taken before a magistrate as hereinbefore required, the arresting officer shall prepare in duplicate written notice to appear in court containing the name and address of such person, the license number of his vehicle, if any, the offense charged, and the time and place when and where such person shall appear in court. Provided, however, that the offense of speeding shall be the only offense making mandatory the issuance of a written notice to appear in court, and only then if the arrested person gives his written promise to appear in court, by signing in duplicate the written notice prepared by the arresting officer; and provided further, that it shall not be mandatory for an officer to give a written notice to appear in court to any person arrested for the offense of speeding when such person is operating a vehicle licensed in a state or country other than the State of Texas or who is a resident of a state or country other than the State of Texas.

(b) The time specified in said notice to appear must be at least ten (10) days after such arrest unless the person arrested shall demand an earlier hearing.

Texas Code of Criminal Procedure
Art. 12.05

An indictment or information for any misdemeanor may be presented within two years from the commission of the offense, and not afterward.